PD-1269-16
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 12/23/2019 1:41 PM
Accepted 12/27/2019 9:24 AM
DEANA WILLIAMSON
CLERK

In the Court of Criminal Appeals of Texas at Austin

RECEIVED
COURT OF CRIMINAL APPEALS
12/27/2019
DEANA WILLIAMSON, CLERK

Christopher James Holder,
Appellant

v.

The State of Texas,
Appellee

No. PD-1269-16

On Discretionary Review of No. 05-15-00818-CR from the Fifth Court of Appeals in Dallas, on Appeal from Cause Number 416-80782-2013 in the 416th District Court District Court of Collin County, Texas, the Honorable Chris Older, Judge Presiding.

State's Supplemental Brief on the Merits

Greg Willis
Criminal District Attorney
Collin County, Texas

John R. Rolater, Jr.
Asst. Criminal District Attorney
Chief of the Appellate Division
SBT#00791565
2100 Bloomdale Rd., Ste. 200
McKinney, Texas 75071
(972) 548-4323
(214) 491-4860 fax
jrolater@co.collin.tx.us

Libby Lange
Asst. Criminal District Attorney

Cynthia Walker
Asst. Criminal District Attorney

Table of Contents

Index of Authorities

Cases

Statutes

Treatises

Constitutional Provisions

To the Honorable Court of Criminal Appeals:

Statement of the Case

A jury convicted Appellant of capital murder. The State did not seek the death penalty, and the trial court imposed a mandatory sentence of life imprisonment without the possibility of parole. The Dallas Court of Appeals affirmed the conviction. *See Holder v. State*, No. 05-15-00818-CR, 2016 WL 4421362 (Tex. App.—Dallas Aug. 19, 2016, pet. granted) (not designated for publication).

This Court granted Appellant's petition for discretionary review on the issue of whether the Court of Appeals erred in holding the State's petition to obtain the Appellant's cellphone records set forth the "specific and articulable facts" required by federal law under 18 U.S.C. § 2703(d). The parties argued the case to the Court on September 22, 2017.

While this case was pending, the United State Supreme Court decided *Carpenter v. United States*, ___ U.S. ___, 138 S. Ct. 2206 (2018), holding that persons have a "reasonable expectation of privacy" in cell site location information (CSLI), and therefore, a search warrant is required to obtain more than seven days' worth of that information pursuant to

the Fourth Amendment. *Id.*, 138 S. Ct. at 2217 & n.3. Four justices dissented.

On October 23, 2019, the Court granted another ground for discretionary review in this case: whether "[t]he Court of Appeals erred in holding the State's acquisition of Petitioner's historical cell phone records under an order issued under the federal stored communications act without a showing of probable cause in the petition was reasonable under the guarantees for privacy in Article I, Section 9 of the Texas constitution." The Court directed both parties to file briefing on this new ground for review.

The Court's existing precedent indicates it would reach the same result as *Carpenter* in construing Article I, § 9 of the Texas constitution

This Court has previously applied Article I, § 9 using the *Katz*[1] test in the same way the Supreme Court applies the Fourth Amendment. *See, e.g., Matthews v. State*, 431 S.W.3d 596, 606-07 (Tex. Crim. App. 2014); *Kolb v. State*, 532 S.W.2d 87, 89 (Tex. Crim. App. 1976). Under *Katz*, a search occurs if the government improperly intrudes on a "reasonable expectation of privacy." *See Carpenter*, 138 S. Ct. at 2213. And, of course, the Supreme Court has held that obtaining CSLI[2] intrudes on a "reasonable expectation of privacy" and requires a warrant. *Id.* at 2217 & n.3. *Katz* was apparently first cited by this Court in 1969. *See Burge v. State*, 443 S.W.2d 720 (Tex. Crim. App. 1969). In 1976, the Court appeared to treat Article I, § 9 as identical to the Fourth Amendment with regard to *Katz*. *See Kolb*, 532 S.W.2d at 89. But the Court did no analysis of the two provisions. *Id.* Based on its past application of the Texas constitution, this Court would likely determine that an illegal search occurred in this case. But the Court has not always read Article I, § 9 as identical to the Fourth Amendment, and it appears the Court has

[1] *Katz v. United States*, 393 U.S. 347, 360-61 (1967) (Harlan, J. concurring).
[2] CSLI refers to cell site location information.

never analyzed whether the *Katz* test is consistent with the text of Article I, § 9.

This Court should discard the *Katz* test because it is inconsistent with the text of Article I, § 9

While this Court has generally applied *Katz* to Article I, § 9, the words "expectation of privacy" do not appear in Article I, § 9. Rather, this Court (and more generally all Texas courts) merely adopted *Katz* wholesale as "the test" for searches without even though the concept of "reasonable expectation of privacy" was merely a brainstorm of an attorney used during oral argument and adopted by a justice in a concurring opinion. *See Carpenter*, 138 S. Ct. at 2237 (Thomas, J., dissenting) (discussing the origins of the concept). Because that concept was invented in the 1960s, it was not in the minds of the constitutional convention when it promulgated the Texas Constitution of 1876. And what the delegates thought of Article I, § 9 is indeed hardly relevant because the text is patent as to what is protected while the delegates may have had competing intents or none at all. *See* Anton Scalia and Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 391-96 (West 2012) (discussing the false notion that interpretation is the search for intent).

This Court applies Article I, § 9 according to its text

Article I, § 9 provides:

> The people shall be secure in *their persons, houses, papers and possessions*, from all unreasonable seizures or searches, and no warrant to search any place, or to seize any person or thing, shall issue without describing them as near as may be, nor without probable cause, supported by oath or affirmation.

Tex. Const. Art. I, § 9 (emphasis added). This Court looks first and chiefly at the text of Article I, § 9 when construing it. *Hulit v. State*, 982 S.W.2d 431, 435 (Tex. Crim. App. 1998); *see also Hughitt v. State*, 583 S.W.3d 623, 626-27 (Tex. Crim. App. 2019) (when interpreting a statute, the Court looks at the literal text and construes it according to the rules of grammar and usage); Scalia and Garner at 56-58. Notably, the text of the provision protects certain things that belong to an individual—their person, their house, their papers, and their possession. Tex. Const. Art. I, § 9. The text does not speak to the property of third persons. *Id.* The text does not contain the word "privacy." These exclusions are important because the expression of one thing implies the exclusion of another. *See Chambers v. State*, 580 S.W.3d 149, 156 (Tex. Crim. App. 2019); Scalia and Garner at 107-11. In other words, because Article I, § 9 applies to searches of a person's house, papers, and possessions, it does not apply to searches of a third person's (or company's) house, papers, or possessions.

Thus, when the police obtained CSLI from AT&T by a court order, *Appellant's* rights were not violated under Article I, § 9 because those records belonged to AT&T and were created for AT&T's business purposes.

The Court is not required to construe Article I, § 9 identically to the Fourth Amendment

This Court is not required to construe Article I, § 9 in order to reach the same result the Supreme Court would reach under the Fourth Amendment. Rather, this Court has already held that:

> [T]he state constitution and the federal constitution are not parts of one legal building; each is its own structure. Each may shield rights that the other does not. The ceiling of one may be lower than the floor of the other.

Hulit, 982 S.W.2d at 437. In *Hulit*, this Court held that the Texas constitution does not generally require a warrant for a search or seizure, even though the Supreme Court generally recognizes a warrant requirement under the Fourth Amendment. *Id.* at 436. And that holding did not otherwise violate the federal constitution. *Id.* at 437-38.

Appellant's rights under Article I, § 9 were not violated

When this Court has actually analyzed Article I, § 9, it has applied it as written. *See Hulit*, 982 S.W.2d at 435. Doing so in this case requires disavowal of *Katz* as it has previously been applied to Article I, § 9. *See, e.g., Matthews*, 431 S.W.3d at 606-07. And this Court should disavow *Katz* because it lacks any basis in the text and history of either the Fourth Amendment or Article I, § 9. *See Carpenter*, 138 S. Ct. at 2235-46 (Thomas, J., dissenting). Under the text of Article I, § 9, Appellant should not prevail because he is complaining of the search of someone else's property—AT&T's business records. The failure of Article I, § 9 to benefit Appellant is simply that the law does not apply to him under these facts. Had police instead taken the data from his phone—his property—or from his phone bills in his possession—his papers—the result would be different.

Declining to extend Article I, § 9 to these facts is consistent with proper application of the text under this Court's role in our system of government. Extending the protection of Texas law to these facts is properly the role of the Legislature (by statute), or the Legislature and the People (by constitutional amendment). And, indeed, since 2012 when

Appellant murdered his victim, the Legislature *has* extended the protection of law to phone records under these circumstances such that police now must obtain them with a warrant. *See* Tex. Code Crim. Proc. art. 18B.351(a).[3]

Applying the text of Article I, § 9 is reasonable because the Texas Constitution contains an amendment process that can be invoked by the people of Texas if they determine that this Court's construction of the existing text does not meet their needs

The ultimate role of the judicial branch is to say what the law is, not what it should be. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); *see also Obergfell v. Hodges*, 135 S.Ct. 2584, 2611 (2015) (Roberts, C.J., dissenting). The power to revise, update, and create law is vested in the legislative branch. Tex. Const. Art. II, § 1; Tex. Const. Art. III, § 1. The legislature has the authority to promulgate amendments to the Texas constitution, and the people of Texas retain the ultimate say on whether to accept those amendments. Tex. Const. Art. XVII, § 1. Constitutional amendments in Texas are frequent and numerous—ten

[3] *See* Act of May 27, 2013, 83rd Leg., R.S., ch. 1289, § 4, 2013 Tex. Sess. Law Serv. 3263, 3265, 3270 (effective June 14, 2013). The offense was committed on or about November 10, 2012. CR 25. Appellant's phone records were obtained on or about November 12, 2012 with a court order. 2 RR 119-20, 126-27, 133-34; *see* SX 8.

amendments were adopted in the most recent general election. *See, e.g.,* https://results.texas-election.com/races, last visited December 20, 2019.

This Court should not undermine its consistent, textual approach to statutory construction (and constitutional interpretation) to create a remedy ultimately applicable only to Appellant. The police acted reasonably under existing law when they obtained AT&T's records relevant to the offense. If Article I, § 9 needs extension or revision that is properly the role of the Legislature and People of Texas. The amendment process is reasonable. This Court should affirm the judgments of the court of appeals and trial court.

Prayer

The State prays that the Court affirm the judgments of the court of appeals and trial court.

Respectfully submitted,

Greg Willis
Criminal District Attorney
Collin County, Texas

/s/ John R. Rolater, Jr.
John R. Rolater, Jr.
Asst. Criminal District Attorney
Chief of the Appellate Division
SBT#00791565
2100 Bloomdale Rd., Ste. 200
McKinney, TX 75071
(972) 548-4323
(214) 491-4860 fax
jrolater@co.collin.tx.us

Libby Lange
Asst. Criminal District Attorney

Certificate of Service

A copy of the State's brief has been sent by electronic service to counsel for Appellant, Steven Miears, at stevemiears@msn.com, and the State Prosecuting Attorney's Office, at information@spa.texas.gov, on this, the 23rd day of December, 2019.

/s/ John R. Rolater, Jr.
John R. Rolater, Jr.

Certificate of Compliance

This brief complies with the word limitations in Texas Rule of Appellate Procedure 9.4(i)(2). In reliance on the word count of the computer program used to prepare this brief, the undersigned attorney certifies that this brief contains 1,768 words, exclusive of the sections of the brief exempted by Rule 9.4(i)(1).

/s/ John R. Rolater, Jr.
John R. Rolater, Jr.